117-504

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 180.

TURPIN AND BROTHER, PLAINTIFFS IN ERROR,

vs.

RUSH BURGESS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF VIRGINIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED DECEMBER 20, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

counsel for the above-named petitioner I have examined the proceedings against him, and have carefully enquired into the matters set forth in the foregoing petition, and that I believe the statements contained in said petition are true.

L. L. LEWIS.

Thereupon the following order was entered:

This day came the defendant in the above-named case & by leave of the court, by his attorney, filed his petition for its removal from the circuit court of the city of Richmond in this court in pursuance of the provisions of section 643 of the Revised Statutes of the United States.

Thereupon it is ordered that the clerk of this court do issue a writ of certiorari to the judge of said court to remove said cause
4 to this court, in accordance with the provisions of the said section of the U. S. Revised Statutes, which was accordingly done, and the said cause docketed in this court.

Thereupon a writ of certiorari was issued by the clerk of this court as directed by said order, which writ, with the marshal's return thereon made, is in the words & figures following, to wit:

The President of the United States of America to the judge of the circuit court of the city of Richmond, State of Virginia, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the eastern district of Virginia, in the fourth circuit, shall be certified of a certain cause commenced by you against Rush Burgess, defendant, by Turpin & Bro., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly & openly send to the said circuit court, at the city of Richmond, forthwith, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

5 Witness M. R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the sixteenth day of December, in the year one thousand eight hundred and eighty-one.

M. F. PLEASANTS, *Clerk.*

Executed 16th Dec'r, 1881, by delivering a copy of this writ to Hon. B. R. Welford, judge of the circuit court city of Richmond.

W. E. NYE,
Deputy, U. S. M.

And at another day, to wit, at a court held as aforesaid, on the 16th day of December, 1881, the following transcript of the records of the circuit court of the the city of Richmond was filed:

VIRGINIA:

In the Circuit Court of the City of Richmond.

Be it remembered that heretofore, to wit, on the 31st day of December, 1875, came Strong Turpin and Miles Turpin, partners, trad-

ing under the name and style of Turpin and Brother, by their attorney, and sued out a writ of summons against Rush Burgess, of a plea of trespass on the case in assumpsit, which writ is in the words & figures following, to wit:

Summons.

6 The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon Rush Burgess, collector of 3rd Int. Rev. Dist. of Va., to appear at the clerk's office of our circuit court of the city of Richmond, at the court-room of said court, in said city, at rules, to be holden for the said court, on the first Monday in January next, to answer the action of Strong and Miles Turpin, partners, trading under the firm and style of Turpin & Brother, of a plea of trespass on the case in assumpsit, damage ten thousand dollars, and have then there this writ.

Witness Alfred Sheild, clerk of our said court, at Richmond, the 31st day of December, 1875, and in the 100th year of of the Commonwealth.

ALFRED SHEILD.

Return.

Executed on the 1st day of January, 1876, by delivering to Rush Burgess a copy of the within summons; and at the same time I served him with a certified copy of the account on which the within suit is brought.

TEMPLE ELLETT, *D. S.*
For JOHN W. WRIGHT, *S. C. R.*

7 And at another day, to wit, at rules held in the clerk's office of the circuit court of the city of Richmond, on the 3rd day of January, 1876, came again the plaintiffs, by their attorneys, and filed their declaration against the said defendant, which declaration, together with the account filed therewith, is in the words and figures following, to wit:

Declaration.

1st Jan'y Rules. In the Circuit Court for the City of Richmond & State of Virginia. Filed at Jan'y Rules, 1876.

Strong Turpin and Miles Turpin, partners, trading under the name & style of Turpin & Brother, complain of Rush Burgess, who has been summoned to answer them, of a plea of assumpsit: For this, whereas, that heretofore, to wit, on the 1st day of January, 1874, at the city of Richmond and State of Virginia, the said plaintiffs were the owners, holders, & manufacturers of 24,982 p'cks of man'f. tobacco which had been manufactured by the said plaintiffs, at their manufactory at the city aforesaid and at the times aforesaid, and which said p'cks of man'f. tobacco they, the said plaintiffs, had declared their intention *of* the said defendant of exporting and

received his willing permission to export in bond out of the State of Virginia to foreign countries & to ports of entry in other
8 States, where bonded warehouses had been established by law for receiving such export tobacco shipped in bond; and that Rush Burgess, said defendant in this suit, claiming to act and actually acting as Int. Rev. collector for said city and for the 3rd Int. Rev. district of Va., required and forced the said plaintiffs, as such defendant, before they exported in bond the said p'cks of man'f. tobacco, as above set forth, to purchase of him and affix an export stamp of the denomination of 25c. (which had printed on same in large letters "For Exportation,") which the said defendant required of the said plaintiffs to affix and cancel such export on each of said p'cks of man'f. tobacco, and the said plaintiff further allege that in obedience to such requirement of the said defendant they did affix and cancel such export stamps as aforesaid on each p'ck as aforesaid, at their plaintiffs' expense, before the said defendant would allow the said plaintiffs to export their said tobacco in bond, and before it was exported, in obedience to his declared intention, as above set forth, from their said manufactory, at the time & place aforesaid, by reason whereof the said defendant unlawfully & without authority collected of the said plaintiffs then &
9 there the sum of $6,245.50, that being 25c. for each export stamp required to be placed on the 24,982 p'cks of man'f. tobacco of the said plaintiffs as aforesaid, and before exportation as aforesaid; whereupon the said plaintiffs, on or about the 24th December, 1875, and before the institution of this suit, appealed to the Comm'r of Int. Rev., at Washington, according to the requirements of the statute, to refund the said sum of $6,245.50 with interest on $460.25, a part thereof from 1st Jan'y, 1869; and interest on $1,368.50, a part thereof, from 1st Jan'y, 1870; and interest on $1,412.25, a part thereof, from 1st Jan'y, 1871; and interest on $1,418.75, a part thereof, from 1st Jan'y, 1872; and interest on $1,085.75, a part thereof, from 6th June, 1872; which said appeal for refunding the said sum of $6,245.50, with interest from the times aforesaid, to the said plaintiffs, was decided adversely to the said plaintiffs, by the said Comm'r of Int. Rev., at Washington, on or about the 29th December, 1875, before the institution of this suit; whereupon and by reason of the said premises an action hath accrued to the said plaintiffs to demand of the said defendant the said sum of $6,245.50, with interest from the times aforesaid. And the said defendant as aforesaid
10 being so indebted in the sum of $6,245.50 with interest, then and there undertook & promised to pay the said plaintiffs the said sum of $6,245.50 with interest as above claimed, but, to pay the said sum of money or any part thereof, or to pay the said interest or any part thereof to said plaintiffs, hath hitherto refused (though often requested,) and still doth refuse to the damage of the said plaintiffs of $10,000; and therefore they have brought this suit.

And whereas also the said defendant afterwards, to wit, at the city & State aforesaid, on the 1st day of January, 1874, being indebted to the plaintiffs in the sum of $10,000, for so much money to the use of the said defendant before that time at his special instance and re-

quest loaned out, paid, and expended; and for so much money to the said defendant at his special instance and request lent and advanced by the said plaintiffs; and also for so much money to & for the use of the said plaintiffs before that time had and received, and being so indebted the said defendant in consideration thereof, afterwards, to wit, at the day & year & the place aforesaid, assumed upon himself, and then and there promised to pay the said sum of
11 $10,000 to the said plaintiffs whenever he should be thereafterwards requested; and whereas, on the day & year & place aforesaid the said defendant accounted with the said plaintiffs of, and concerning divers sums of lawful money before that time due & in arrears, and then and there in arrears and unpaid, and upon the said account the said defendant was found in arrears & indebted then and there in the sum of $10,000, and due and owing to the said plaintiffs, and being so indebted, and in consideration thereof, at the time and place aforesaid, assumed upon himself and then and there promised to pay the said sum of $10,000 to the said plaintiffs whenever he should be thereaftewards requested; and although the said defendant has been often requested, he hath not yet paid the several sums of money, or kept the several promises and assumptions, nor hath he paid any part of the said sums of money, but to pay the same or any part thereof hath hitherto refused and still doth refuse to the damage of the said plaintiffs $10,000.

And therefore they have brought this suit.

W. P. BURWELL, *P. Q.*

12 *Account.*

Rush Burgess, Collector of 3d dist. of Int. Rev. of Va., to Turpin & Bro., Dr.

1868, on p'cks man'f. tobacco;	1841 @ 25c. ea.		$460 25
1869, "	6474 @ 25c. ea.		1368 50
1870, "	5649 @ 25c. ea.		1412 25
1871, "	5675 @ 25c. ea.		1418 75
1872, "	4343 @ 25c. ea.		1085 75
	24982		$6245 50
1869, with int. from Jan'y 1st			$460 25
1870, " " 1st			1368 50
1871, " " 1st			1412 25
1872, " " 1st			1418 75
1872, " June 6th			1085 75

Whereupon, the defendant being summoned and not appearing, on the motion of the plaintiffs, by their attorney, it was ordered that judgment be entered for the said plaintiffs against the defendant for what damages the plaintiffs ought to recover, unless the defendant should appear at the then next rules and answer the plaintiffs' action.

And at another day, to wit, at rules held in the clerk's office
13 of the said court, on the 31st day of January, 1876, the defendant still failing to appear, on the motion of the plaintiffs, by their attorneys, it is ordered that the conditional judgment entered in this case at the last rules be confirmed.

And at another day, to wit, at a circuit court of the city of Richmond, held at the court-room in said city, on the 23rd day of February, 1876, that being the fifteenth judicial day of the February term, 1876, the judgment obtained at the rules not having been set aside, and the plaintiffs being now entitled to a formal judgment, it is therefore considered that the plaintiffs recover against the defendant six thousand two hundred and forty-five dollars and fifty cents, with interest on $460.25, part thereof, from 1st Jan'y, 1869; on $1,368.50, other part thereof, from the 1st day of January, 1870; on $1,412.25, other part thereof, from the 1st day of January, 1871; on $1,418.75, other part thereof, from 1st day of January, 1872; and on $1,085.75, other part thereof, from the 6th day of June, 1872, until paid, and their costs by them about their suit in this behalf expended.

14 And now, at this day, to wit, at a circuit court of the city of Richmond, held at the court-room in said city, on the 26th day of November 1877, Turpin Brothers, Pl'ts, against Rush Burgess, def't, upon a motion of the defendant to reverse and annul the judgment rendered in this cause, by default, on the 23rd day of February, 1876, for the following reasons: "That it sufficiently appears from the plaintiffs' declaration that there is no cause of action on the part of the plaintiffs against the defendant, and that judgment in said cause should have been for the defendant & not for the plaintiffs, inasmuch as it appears from the declaration that the money alleged to have been illegally demanded and received by the defendant from the plaintiffs was properly demanded and paid according to the internal revenue laws of the United States; and, secondly, because said suits was instituted in one name, to wit: against Rush Burgess, collector of internal revenue for the 3rd district of Vir-
15 ginia, and the declaration and judgment therein is in another name, to wit: Rush Burgess individually.

This day came the parties, by their attorneys, and on motion of the defendant it is ordered that said motion be docketed.

And now at this day, to wit, at a circuit court of the city of Richmond, held at the court-room in said city on Friday, the 16th day of December, 1881, come again the parties by their attorneys, & the court having maturely considered the papers in this cause upon which the said judgment was entered upon the 23rd day of February, 1876, and being of opinion that said judgment was erroneous, doth reverse the same, and doth order this cause to be placed on the docket, with leave to the plaintiffs to file a new declaration.

And thereupon on motion of the defendant, by his attorney, it is ordered that this cause be removed for trial in the circuit court of the United States for the eastern district of Virginia and fourth circuit, next to be holden in said district, in accordance with the terms of the writ of certiorari issued from the said circuit court on this day,

the 16th day of December, 1881, upon the petition filed in
16 the said circuit court by the said defendant, under the provisions of section 643 of the Revised Statutes of the United States, and directed to the judge of this court, and delivered to the clerk of this court on this the 16th day of December, A. D. 1881.

Transcript of the record.

Teste: ALFRED SHEILD, *Clk.*

And at the same day, to wit, on the 16th day of December, 1881, came the plaintiffs, by their attorneys, and filed their amended declaration, which amended declaration is in the words & figures following, to wit:

Amended Declaration.

In the Circuit Court of the United States for the Eastern District of Virginia.

Strong Turpin and Miles Turpin, partners, trading under the name & firm of Turpin & Brother, plaintiffs, complain of Rush Burgess, collector of internal revenue for the 3rd district of Virginia, defendant, who has been summoned to answer them of a plea of assumpsit, for this, that whereas heretofore, to wit, on the — day of Jan'y, 1874, at city of Richmond and State of Virginia, the said plaintiffs were
17 the owners and manufacturers of a number of packages of manufactured tobacco, which had been manufactured at the manufactory of the said plaintiffs in said city & State, and within the above-mentioned internal revenue district, which said tobacco they the said plaintiffs declared their intention of exporting abroad to the said defendant, and received his written permission under the law, so to export out of the State of Virginia to foreign countries, and said Rush Burgess as said defendant in this suit, claiming to act and actually acting as internal revenue collector for the said 3rd district of Virginia, required & forced the said plaintiffs, as such defendant, before he was allowed to export in bond the said packages of tobacco as above set out, which bond separated the tobacco so going abroad from that to be consumed in the country, effectually & without fraud to the Government revenues; and to purchase of him as such internal revenue collector as aforesaid, and affix an export revenue stamp of the denominations of 25c. & 10c.; that the said stamps were paid for like all other stamps for collecting the revenue, and had printed on them in large letters "For Exportation," and that the said defendant as such internal revenue collector, under
18 the law & regulations of the Department at Washington, was required to deposit the said revenue in whole so derived from these export stamps into a U. S. Governmental depository daily, accounting for the said moneys as any other taxes received in his official capacity and under his official bond, and the said defendant did then and there pay into the treasury of the United States, and so account for the taxes so received from the plaintiffs for said export stamps.

And the said plaintiffs further allege that they did at their own

expense affix and cancel the said export stamps on his said packages of tobacco, and that they did over & beyond paying the said 25c. and 10c. for said export stamps to such defendant as aforesaid, and over and beyond their said expense of affixing said export stamps, pay to an internal revenue inspector the further sum of 12c. per 100 lbs., as official fees and charges for so inspecting their tobacco, which was to be exported as aforesaid out of the country, and all other charges & expenses attending their shipment, all of which the said defendant, under the law and regulations as aforesaid, required the said plaintiffs to do at their own expense, before the said defendant would allow the said plaintiffs to export their said tobaccos in obedience
19 to their declared intention, as above set forth, from their manufactory abroad at the time and place aforesaid, by reason whereof the said defendant as collector aforesaid unlawfully & without authority collected of the said plaintiffs against their protest the said several sums of money amounting to $6,245.50, that being 25c. & 10c. for each export revenue stamp required to be placed on the manufactured tobacco of the said plaintiffs.

Whereupon the said plaintiffs within six months before the institution of this suit appealed to the Comm'r of Internal Revenue at Washington, according to the requirements of the statue made and provided in such cases, to refund the said several sums of money amounting to $6,245.50 with interest on the same, which said appeals for refunding these several sums amounting to $6,245.50, with interest from the times specified in said appeal, was decided adversely to plaintiffs, on the ground that the law was constitutional & the taxes were properly collected on or about the 29th December, 1875, and within six months before the institution of this suit.

And the plaintiffs further allege that the 25c. paid by them for these export stamps was 258 times more than their cost
20 to the Government, and that the said sum of money thus illegally collected of them was returned by the Comm'r of Internal Revenue and Secretary of the Treasury as so much money collected of an export tax, and was appropriated by Congress as so much revenue.

Wherefore, by reason of the premises, an action hath accrued to the said plaintiffs to demand of the said defendant as collector aforesaid $6,245.50, with interest from the times aforesaid, and the said defendant, being so indebted in the said sum with interest as aforesaid to said plaintiffs, then and there undertook to pay the said sum of money with interest to said plaintiffs, but to pay the said sum of money or any part thereof, or the interest or any part thereof, though often requested, hath hitherto refused and still doth refuse to the damage of said plaintiffs $12,000.

BURWELL, *P. Q.*

And on the same day, to wit, on 16th Dec'r, 1881, came the defendant, by his attorney, and entered a plea of *non assumpsit;*
21 and thereupon, issue being joined, the following stipulation was filed, to wit:

TURPIN & BROTHER *vs.* RUSH BURGESS, Collector.

The parties in this case, by their attorneys, hereby stipulate to waive a jury, and to submit the questions of fact in the case to the finding and determination of the court.

WM. P. BURWELL,
For Plaintiffs.
L. L. LEWIS,
U. S. Attorney for Def't.

TURPIN & BROTHER *vs.* RUSH BURGESS, Collector.

This day came the parties, by their attorneys, and the court having maturely considered the questions of law and fact arising in the case doth find for the defendant; therefore it is considered by the court that the plaintiff- take nothing by *his* bill, but for *his* false clamor be in mercy, &c., and that the defendant go thereof without day and recover against the plaintiff- his costs by him about his defence expended.

Dec'r 16th, 1881.

RO. W. HUGHES, *Judge.*

The following facts are found by the court under the agree-
22 ment of parties through counsel, according to section 649 R. S. of U. S., from the evidence adduced and certified as follows:

That the plaintiffs were manufacturers of tobacco in Richmond, and within the internal revenue district of the defendant, and as such they paid the sum of money in the declaration mentioned, to wit, $6,245.50 for export stamps on their tobacco exported against the payment of which they protested, and appealed to the Comm'r of Int. Rev. at Washington for refunding the same according to the statutes and the rules and regulations of the Department, made in pursuance thereof, which appeal was rejected by the Comm'r, and this suit was brought within six months thereafter; that a tracing of the tobacco export stamp, under which this export tax was collected, is filed herewith, marked as Exhibit "B"; that this money in the declaration mentioned was collected by the defendant as such collector from these plaintiffs, was deposited in gross under section R. S. 3210, like all other public revenues collected by the instrumentality of stamps, daily into a U. S. Governmental depository at Richmond, Va., and that a receipt was taken under the law from the proper officer of said depository, stating specifically that the deposit was made on account of export stamp taxation; that the fees & charges of the
23 officer who inspected their export tobacco were paid by the plaintiffs at the rate fixed by the commissioner of internal revenue under the law at 12c. per 100 lbs. of tobacco exported, and no part of this money collected from these export stamps could go under the law for fees and charges of these officers or any other expense attending the exportation of these tobaccos, but all these expenses were paid by the exporter inclusive of those for cancelling & affixing these export stamps; that the export bonds executed under section 3,385 of R. S. alone protected the Government effect-

ually against the fraud of relanding the tobacco without payment of the excise tax, inasmuch as the landing certificate signed by U. S. consul at the port to which the tobacco was consigned was necessary to cancel the said export bond under the old law, and the certificate of the customs officer is necessary now under the amended law, that the tobacco has been placed on the manifest of an outward bound vessel, and that it is the export bond given by the exporter which effectually separates the tobacco going abroad from that to be consumed in the United States, and the export stamp in no sense protects the Government against fraud; that the said collector specifically stated in his monthly report forwarded to the commissioner the amount of revenue he received from the sale of these export stamps, as he did the amount of revenues he received
24 from all other stamps, and it was only by payment in gross of the said revenues into the Governmental depository that he relieved himself of accountability to the Comm'r of internal revenue at Washington (see form 70 of said report), which public revenues were paid unto the treasury of United States without any abatement on account of salaries, fees, charges of any description whatever. And the Comm'r of Internal Revenue made report to the Secretary of Treasury and Congress annually of these revenues thus received from export stamps as so much revenue received from "this specific source, for stamps, for tobacco, &c.; intended for export." See his annual reports for 1876, p. 31, and p. 14 & 15, as well as his annual reports made since and before, also the return of these export tobaccos, made to Congress in these annual reports, under head of "E," "as one of the articles now taxable." (See report, 1877, p. 156.) That the official bond of the collector and defendant covered these export stamp revenues as all other taxes & revenues collected by law through the instrumentality of stamps, and the entire revenues on tobacco are collected by & through the instrumentality of stamps; that the export stamps can be furnished at one-tenth of one cent or less, in quantities, and that these export tobaccos would be subject of forfeitures if shipped by manufacturer without these
25 export stamps affixed and cancelled, and the said plaintiffs were required in addition to the export stamp to have marked or stenciled on each package of these export tobaccos in large letters the words "For Exportation."

Richmond, Dec'r, 1881.

RO. W. HUGHES, *Judge.*

(Here follows cut marked p. 25.)

TURPIN & BROTHER *vs.* RUSH BURGESS, Collector.

And now, on this 16th day of December, 1881, at a term of the circuit court of the United States, on motion of plaintiffs, by their attorney, a writ of error is allowed them to the final judgment rendered on this day, on the issue joined between the parties, and it is ordered that the said plaintiffs or some one for them, execute a bond before the clerk of this court in a penalty of $200, to be approved

Exhibit "B" No. 180. Purpin & Bro. vs. Burgess, Coll. } $25.

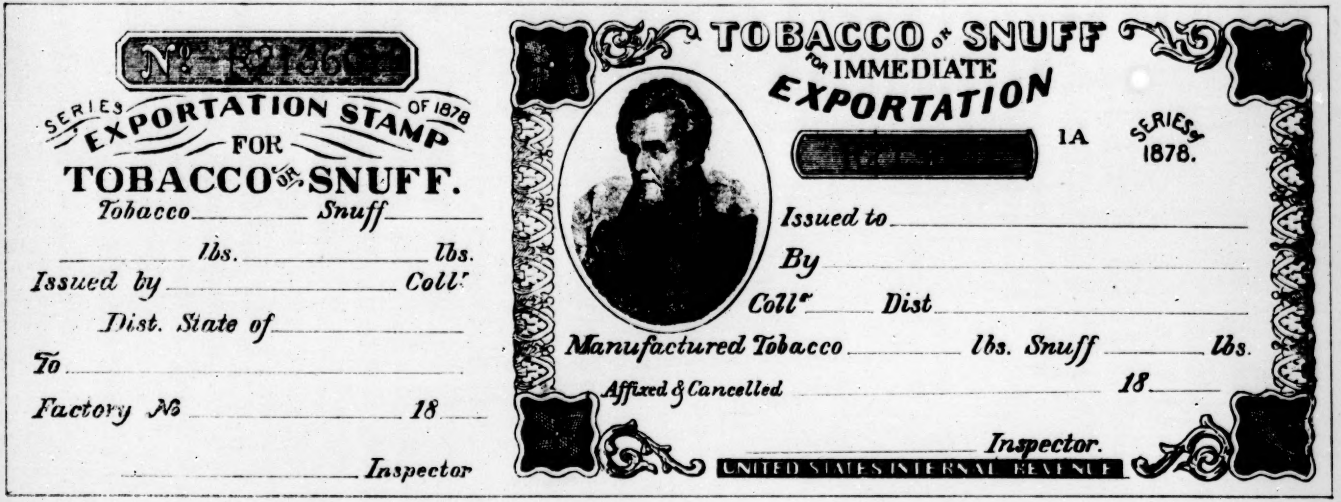
TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE, *Washington, February* 1, 1881.

SIR: In compliance with your verbal request, I have the honor to inclose tracing of the present export stamp for tobacco and snuff.

Respectfully,

GREEN B. RAUM, *Commissioner.*

Hon. J. RANDOLPH TUCKER, *House of Representatives.*



by court or judge thereof for payment of costs and conditioned accordingly.

Richmond, 16th Dec'r, 1881.

RO. W. HUGHES, *Judge.*

26 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Virginia, }

I, M. F. Pleasants, clerk of the United States circuit court for the eastern district of Virginia, hereby certify that the foregoing is a true copy of the record and proceedings in the cause mentioned in the caption thereto as the same remains in the files of my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, this 14th day of November, 1882.

[Seal United States Circuit Court, Eastern District of Virginia. E. pluribus unum.]

M. F. PLEASANTS.

27 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said court before you, between Turpin and Brother and Rush Burgess, collector of internal revenue, 3d district of Va., a manifest error hath happened to the great damage of the said Turpin and Brother, as by complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the district of Columbia, on the second Monday of October next, in the said *circuit* Court to be then and there held, that the record and proceedings aforesaid being inspected, the said *circuit* Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of December, in the year of our Lord one thousand eight hundred and eighty-one.

[Seal United States Circuit Court, Eastern District of Virginia. E pluribus unum.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States
for the District of Virginia.

28 UNITED STATES OF AMERICA, *to wit:*

To Rush Burgess, collector of internal revenue for the 3rd district of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at the court-room in the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein Turpin & Brother are plaintiffs, and Rush Burgess, collector of internal revenue 3rd dist. Va., is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of December, in the year of our Lord one thousand eight hundred and eighty-one.

[United States Circuit Court, Eastern District of Virginia. E pluribus unum.]

RO. W. HUGHES, *Judge.*

29 I acknowledge service of this.

JNO. S. WISE, *U. S. Att'y.*

30 Circuit Court of the United States of America, East. District of Virginia.

TURPIN & BROTHER *vs.* RUSH BURGESS, Collector.

Know all men by these presents, that we, Wm. P. Burwell and Chas. S. Stringfellow, are held and firmly bound unto the United States in the sum of two hundred dollars, to be paid to the said United States, heirs, executors, administrators, or assigns—to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 16th day of December, A. D. 1881.

Whereas the above-named Turpin & Brother hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United for the eastern district of Virginia:

Now, therefore, the condition of this obligation is such that if the above-named Turpin & Brother shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

WM. P. BURWELL. [SEAL.]
CHAS. S. STRINGFELLOW. [SEAL.]

Sealed and delivered in presence of—
M. F. PLEASANTS, *Clerk.*

Approved.

RO. W. HUGHES,
U. S. Dist. Judge.

Endorsed on cover: E. Virginia. C. C. U. S. No. 180. Turpin & Brother, plaintiffs in error, *vs.* Rush Burgess, collector of internal revenue for the third district of Virginia. Filed 20th December, 1882.

117-504

Supreme Court of the United States.

NO. 180.

TURPIN AND BROTHER, PLAINTIFFS IN ERROR,

vs.

RUSH BURGESS,

COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF VIRGINIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Brief of CHAS. S. STRINGFELLOW, *Counsel for Plaintiffs in Error.*

Supreme Court of the United States.

NO. 180.

TURPIN AND BROTHER, PLAINTIFFS IN ERROR,

vs.

RUSH BURGESS,
COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF VIRGINIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

STATEMENT OF THE CASE.

The plaintiffs in error brought this suit in the Circuit Court of Richmond, Virginia, to recover from the defendant (who was collector of internal revenue) the amount of $6,245.50, paid by plaintiffs to defendant for export stamps which they were compelled to buy and have affixed to upwards of twenty-four thousand packages of manufactured tobacco manufactured by them in Richmond, where they resided, and intended for exportation. These payments were made from 1869 to 1872, inclusive, under the Act of July 20, 1868 (15 stat. 157). This act imposed an excise tax of thirty-two cents per pound on all manufactured tobacco except smoking tobacco, on which the tax was sixteen cents per pound, and heavy penalties and forfeitures for removing the same from the factory without being put up in proper packages, and having stamps affixed and cancelled to indicate payment of the tax and compliance with the law.

Section 74 provided "That manufactured tobacco and snuff may be removed in bond from the manufactory without payment of the tax, to be transported directly to an export bonded warehouse for the storage of manufactured tobacco or snuff established at a port of entry as hereinbefore provided; and the deposit and withdrawal from any bonded warehouse, the transportation and exportation of manufactured tobacco and snuff *shall be made under such rules and regulations, and after making such entries and executing such bonds and giving such additional security as may be prescribed by the Commissioner of Internal Revenue*, which shall, in all respects, as far as applicable, conform to the provisions of law and regulations relating to distilled spirits, to be deposited in or withdrawn from bonded warehouse, or transported or exported. *All tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped shall be paid to the collector* on making the entry for such transportation."

The section immediately preceding makes the following provisions as to bonded warehouses: "That the Commissioner of Internal Revenue, upon the execution of such bonds as he may prescribe, may designate and establish at any port of entry in the United States, bonded warehouses for the storage of manufactured tobacco and snuff in bond, intended for exportation, selecting suitable buildings for such purpose, to be recommended by the Collector in charge of exports at such port, to be known as bonded warehouses, and used exclusively for the storage of manufactured tobacco and snuff in bond. Every such warehouse shall be under the control of the Collector of Internal Revenue in charge of exports at the port where such warehouse is located, and shall be in charge of an internal revenue storekeeper, assigned thereto by the Commissioner of Internal Revenue. No manufactured tobacco or snuff shall be withdrawn or removed from any bonded warehouse without an order or permit from the collector in charge of exports at such port, which shall be issued only for the immediate transfer to a vessel by which such tobacco or snuff is to be exported to a foreign country, as hereinafter provided, or after the

tax has been paid thereon. And such warehouse shall be under such further regulations as the Commissioner of Internal Revenue may prescribe," &c.

Of course, these being private enterprises, the manufacturers paid storage to the owners so long as their tobacco remained in the warehouse, and no expense was entailed on the government. They were found to be wholly unnecessary, and have long since been abolished. The suit was transferred to the Circuit Court of the United States for the Eastern District of Virginia, and the parties having waived a jury, by written stipulation as required by law, the defendant pleaded *non assumpsit*, on which plea the plaintiffs joined issue, and the court found the facts, which are few in number, and so succintly stated that they cannot be condensed, as follows:

"That the plaintiffs were manufacturers of tobacco in Richmond, and within the internal revenue district of the defendant, and as such they paid the sum of money in the declaration mentioned—to wit, $6,245.50—for export stamps on their tobacco exported, against the payment of which they protested, and appealed to the Commissioner of Internal Revenue at Washington for refunding the same according to the statutes and the rules and regulations of the Department, made in pursuance thereof, which appeal was rejected by the commissioner, and this suit was brought within six month thereafter; that a tracing of the tobacco export stamp, under which this export tax was collected, is filed herewith, marked as Exhibit "B"; that this money in the declaration mentioned was collected by the defendant, as such collector, from these plaintiffs, was deposited in gross under section R. S. 3210, like all other public revenues collected by the instrumentality of stamps, daily into a United States Governmental depository at Richmond, Va., and that a receipt was taken under the law from the proper officer of said depository, stating specifically that the deposit was made on account of export stamp taxation; that the fees and charges of the officer who inspected their export tobacco were paid by the plaintiffs at the rate fixed by the commissioner of internal revenue under the law at 12 cents per 100 pounds of tobacco exported, and no part of this money collected from these export stamps could go, under the law, for fees and charges of these officers, or any other expense attending the exportation of these tobaccos, but all these

expenses were paid by the exporter, inclusive of those for cancelling and affixing these export stamps; that the export bonds executed under section 3385 of R. S. alone protected the Government effectually against the fraud of relanding the tobacco without payment of the excise tax, inasmuch as the landing certificate signed by United States consul at the port to which the tobacco was consigned was necessary to cancel the said export bond under the old law, and the certificate of the customs officer is necessary now under the amended law that the tobacco has been placed on the manifest of an outward-bound vessel, and that it is the export bond given by the exporter which effectually separates the tobacco going abroad from that to be consumed in the United States, and the export stamp in no sense protects the Government against fraud; that the said collector specifically stated in his monthly report forwarded to the commissioner the amount of revenue he received from the sale of these export stamps, as he did the amount of revenues he received from all other stamps, and it was only by payment in gross of the said revenues into the Governmental depository that he relieved himself of accountability to the Commissioner of Internal Revenue at Washington (see form 70 of said report), which public revenues were paid into the treasury of the United States without any abatement on account of salaries, fees, charges of any description whatever. And the Commissioner of Internal Revenue made report to the Secretary of the Treasury and Congress annually of these revenues thus received from export stamps as so much revenue received from "this specific source, for stamps, for tobacco, &c., intended for export." See his annual reports for 1876, p. 31 and p. 14 and 15, as well as his annual reports made since and before; also the return of these export tobaccos made to Congress in these annual reports, under the head of "E," "as one of the articles now taxable." (See report, 1877, p. 156.) That the official bond of the collector and defendant covered these export stamp revenues, as all other taxes and revenues collected by law through the instrumentality of stamps, and the entire revenues on tobacco are collected by and through the instrumentality of stamps; that the export stamps can be furnished at one-tenth of one cent or less, in quantities, and that these export tobaccos would be subject of forfeitures if shipped by manufacturer without these export stamps affixed and cancelled, and the said

plaintiffs were required, in addition to the export stamp, to have marked or stenciled on each package of these export tobaccos, in large letters, the words "For Exportation."

The fac simile of the stamp is in the record page 10.

Upon these facts the Circuit Court gave judgment for the defendant, and the case was brought to this court on writ of error to review and reverse this judgment.

ASSIGNMENT OF ERROR.

The plaintiffs in error assign as error this action of the court, and insist that the facts as found are not sufficient to support the judgment rendered thereon, because the charge of twenty-five cents for each of the stamps placed on the packages of their manufactured tobacco intended for exportation was a tax or duty within the true intent and meaning of that clause of the Constitution of the United States which declares that "no tax or duty shall be laid on articles exported from any State."

POINTS OF LAW.

From what has been stated, it appears that the question presented for determination is precisely the same heretofore decided by this court in *Pace* v. *Burgess*, 92 U. S. 372.

It is certain that the decision in that case has not been received with the approval and acquiescence which Bench and Bar are accustomed to accord to the judgments of this high tribunal. It was respected, it is true, in the case of *Burwell* v. *Burgess* (32 Gratt. 472) by the Court of Appeals of Virginia, but solely because "of opinion that the final and conclusive adjudication of the constitutionality of a revenue law of Congress and its construction belongs to the jurisdiction of the Supreme Court of the United States." They stated very distinctly that "if it were an original question which had not been passed on by the Supreme Court of the United States, we (they) should find it difficult to hold that the money so collected from the exporter by authority of an Act of Congress, which requires it to be paid into the United States treasury, was not a tax, and a tax in disguise upon the exportation of the article from a State." That they did so consider it is plain from the opinion of the court. See 32 Gratt., pp. 475–'6–'7–'8.

Subsequently, after this payment of twenty-five cents per package had been reduced to ten cents, under the Act of June 6, 1872 (17 Stat. 254), to-wit, on the 2d February, 1882, Mr. Dunnell, from the Committee of Ways and Means, submitted the following report, which was committed to the Committee of the Whole House on the State of the Union and ordered to be printed, viz:

47TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 184

EXPORT TAX ON TOBACCO AND SNUFF.

FEBRUARY 2, 1882.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. DUNNELL, from the Committee on Ways and Means, submitted the following

REPORT:

[To accompany bill H. R. 3854.]

The Committee on Ways and Means to whom was referred bill H. R. 1773, *have had the same under consideration, and report thereon*:

The Commissioner of Internal Revenue thinks that the export stamp required by the Revenue Statutes, section 3385, should be continued. The committee, therefore, decline to recommend the repeal of so much of the said section as requires the said stamps to be affixed to packages intended for exportation. But the charge of ten cents for said stamps to the exporter is so much in excess of the cost thereof and the expense of affixing it to the packages as to be to the extent of such excess in violation of that clause of the Constitution of the United States, Article I, section 9, in these words: "No tax or duty shall be laid on articles exported from any State."

The committee here refer in this connection to a letter from the department in these words:

Though the total amount received year by year has been entered with collections from other sources, and though the value of the

stamps sold over and above the cost of manufacturing and furnishing them is in reality an item of revenue, it was not designed so to be. It was intended, as already stated, as a part of a general system. The government might have furnished them free of expense.

The stamp was thought to be necessary, as a kind of passport, to protect the tobacco from the factory to the port of entry. As such I do not deem it indispensable. The manufacturer's bond and the collector's permit for the removal, provided for in section 3385 of the United States Revenue Statutes, would doubtless accomplish that object. * * * It may be a question whether the Government cannot well afford to furnish such stamps free of expense to exporters, since in all cases, an inspection fee, sufficient to pay for inspecting, marking, branding, &c., is required to be paid by the manufacturers, under regulations prescribed by the Commissioner of Internal Revenue.

Your committee further report that in the case of *Pace* v. *Burgess* (92 U. S. Supreme Court Reports, p. 372), the question was considered, and the court declined to pronounce the law unconstitutional, because it did not appear clearly to the court that under pretext of fixing a fee a duty was imposed. The court took the view, further, that the charge of ten cents was perhaps needed to cover fees paid to officers for performing the duty of affixing the stamps. But the fee of twelve cents is charged and paid to the officers, in addition to the stamp tax, under the regulations of the department as above referred to; so that the ten cents is not for that purpose.

In a later case of *Burwell* v. *Burgess* (reported in 32 Grattan, p. 472) the Court of Appeals of Virginia, while yielding to the decision of the Supreme Court in *Pace* v. *Burgess*, *supra*, intimated its decided opinion that the law was unconstitutional.

Your committee, therefore, in view of the above facts as stated, and the clause of the Constitution above quoted, recommend its repeal.

The whole annual revenue from this source, as returned by the Commissioner of Internal Revenue to Congress in his annual reports, is about $7,000.

Annexed herewith find sample of export stamp. with letter in-

closing same, from Hon. Green B. Raum, Commissioner of Internal Revenue.

The committee report the accompanying bill as substitute for bill H. R. 1773.

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, January 30, 1882.

N. P. BURWELL, ESQ.:
Washington, D. C.;

SIR,—Replying to your letter of the 28th instant, I have to say that the Act of July 20, 1868, provided, in regard to tobacco and snuff, that every package removed from the factory or place where it was made, should have an appropriate stamp affixed; if removed for sale or consumption, a proper stamp for the amount of tax thereon; if intended for export, an engraved stamp indicative of such intention.

Failure to affix such stamps in either case was made punishable with fine and imprisonment. See section 3374, United States Revised Statutes.

The export stamp I never regarded as being a revenue stamp or as intended for a revenue measure, but as being a part of the system adopted by that act, and since kept in force, for collecting taxes on all tobacco, snuff and cigars removed for consumption in the country, and to provide for the exportation of tobacco without the previous payment of the tax, and then resorting to the drawback system to have the tax refunded when the tobacco, &c., should have been exported.

The engraved stamp was to be affixed to the export package—the same stamp, whether the package was large or small, a single original package, or made up of any number of small original packages.

The value of the export stamp bore no relation to the size of the package, and in no way indicated a tax on the contents of the package.

The law required the Commissioner of Internal Revenue to furnish the export stamps to the collectors as he furnished other stamps. They were charged to them, and accounted for as other stamps. And for the expenses attending the providing and affixing thereof, twenty-five cents for each package was to be paid to

the collector on making the entry for transportation. By the Act of June 6, 1872, the sum of ten cents, instead of twenty-five cents, was to be paid.

Though collectors have been required month by month to report to the Commissioner of Internal Revenue the sums received by them from exporters of tobacco for those stamps; and though the total amount received year by year has been entered with collections from other sources; and though the value of stamps sold over and above the cost of manufacturing and furnishing them is, in reality, an item of revenue, it was not designed so to be. It was intended, as already stated, as a part of a general system. The government might have furnished them free of expense.

The stamp was thought to be necessary as a kind of passport, to protect the tobacco from the factory to the port of export. As such, I do not deem it indispensable. The manufacturer's bond and the collector's permit for the removal, provided for in section 3385 of the United States Revised Statutes, would, doubtless, accomplish that object. The stamp I regard as only an additional mode of identifying the shipment and secure it from detention or suspicion of unlawful removal while *in transitu*.

It may be a question whether the government cannot well afford to furnish such stamps free of expense to exporters, since, in all cases, an inspection fee sufficient to pay for inspecting, marking, branding, &c., is required to be paid by the manufacturers, under regulations prescribed by the Commissioner of Internal Revenue.

Very truly, yours,

I. KIMBALL.

Sample of the stamp referred to is already in the record—p. 10. This was the unanimous report of the committee, as appears by reference to Congressional Record, vol. xiii, p. 5571. House bill 3854, which it accompanied, passed the House without a dissenting voice, we believe, went to the Senate, and was there referred to the Finance Committee. The title of the bill was and is, "An Act to repeal so much of section thirty-three hundred and eighty-five of the Revised Statutes *as imposes an export tax on tobacco.*" It was reported to the Senate with an amendment to *the title.* (Congressional Record, p. 5876.) Subsequently taken up by unanimous consent, the amendment non-concurred in, and the bill, with

title as above, passed (Congressional Record, p. 6988), and the same is now chap. 468 U. S. Statutes, vol. xxii, p. 372.

It thus appears that the only Supreme Court of any State that has had occasion to consider the case of *Pace* v. *Burgess* found itself unable to agree in its conclusions, that Congress, which passed the law, after it had first reduced the amount from twenty-five to ten cents, with its attention specially called to this case, and with the knowledge that this court had decided that the exaction of this sum was constitutional, repealed so much of the existing law as required it, upon the express ground that it did impose an export tax on the tobacco, and was therefore to that extent unconstitutional. The explanation of this difference of opinion evidently is, either that the facts in *Pace* v. *Burgess* were not stated with sufficient certainty, or else that the time of counsel was so much occupied with the numerous other questions arising out of the eight or ten bills of exceptions in that case, that they were not properly brought to the attention of the court. Do the facts, as found by the Circuit Court in this case, justify the judgment rendered? That is the sole inquiry, for the facts themselves are not open to question. *Prentice* v. *Stearns*, 113 U. S. 445.

Sections 9 and 10 of Article I of the Constitution are both prohibitory. The former applies to the General Government, the latter to the States. Clause 5 of section 9, and clause 2 of section 10 are *in pari materia*. The prohibition directed against the State in the latter is qualified. "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, *except what may be absolutely necessary for executing its inspection laws*,' &c. That directed against the General Government is absolute and unqualified. "No tax or duty shall be laid on articles exported from any State." When this clause was under consideration in the convention that framed the Constitution, Mr. Clymer moved to amend it by inserting after the word "duty" the words "for the purpose of revenue," so as to make it read, no tax or duty for the purpose of revenue shall be laid on articles exported from any State, thus by implication giving the power to lay such tax as might be necessary to enforce inspection or internal revenue laws, but the amendment was voted down. Evidently the purpose was to relieve exports of all burdens of every kind, incidental as well as direct. Madison's Debates, vol. v, p 456. The States may impose

a tax on exports so far as such tax is "absolutely necessary" to enforce its inspection laws, and so far only. Congress cannot do so even to that extent. This is a question of power, and does "not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." *Brown* v. *Maryland*, 12 Wheat. 265. If Congress cannot impose a tax or burden on exports, even when absolutely necessary to enforce its inspection laws, on what principle can it impose one, even though absolutely necessary to enforce its internal revenue laws? It has the power to tax tobacco manufactured and consumed in this country, but has not the power to tax that manufactured here to be exported from any State. As incidental to its power to tax the former, it has, of course, the power to prescribe such regulations as are necessary to prevent frauds by its withdrawal or concealment so as to escape taxation. But in view of the constitutional provisions quoted, it would seem that the expenses thereby incurred must be charged and paid as expenses incidental to the collection of taxes on that which it has the power to tax, and no part thereof be imposed on the article over which it has no power of taxation, under the pretext that it is done to enable that article to enjoy the exemption guaranteed by the Constitution.

It is said in *Pace* v. *Burgess* that "the stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected." But it cannot, it seems, be justified on that ground, because "Congress may not adopt any means for the execution of an express power that Congress may see fit to adopt. It must be a *necessary* and proper means within the fair meaning of the rule." C. J. Chase, 12 Wal. 571–2. Now, the court below has found as a fact "that it is the export bond given by the exporter which effectually separates the tobacco going abroad from that to be consumed in the United States, and the export stamp in no sense protects the Government against fraud," and the Internal Revenue Department admits that such is the fact, for Mr. Kimbal says: "The stamp was thought to be necessary as a kind of passport to protect the tobacco from the factory to the port of export. As such I do not deem it indispensable. The manufacturer's bond and the collector's per-

mit for removal, provided for in section 3385 of the United States Revenue Statutes, would doubtless accomplish that object." The stamp, therefore, was not a necessary means, no matter what Congress thought, and the exaction of the large sum paid by the plaintiffs cannot be justified on that ground.

Nor does it seem altogether accurate to say that the manufacturer was by this means relieved of the taxation to which other tobacco was subjected, for clearly in this case the plaintiffs in error were only relieved of the difference between $6,245.50, the cost of the stamps, and the excise tax on other tobacco of equal amount to that which they exported; whereas the Constitution declares that they should not be taxed at all. If the tax on such other tobacco was, say $56,245.50, and in order to secure exemption from the payment of this sum, these plaintiffs were compelled to pay $6,245.50, it is very hard to understand that they have not in fact paid a tax of that amount. It is certain that they have in fact paid that sum for the privilege of exporting their tobacco, for without its payment they could not remove it from their factory. To this extent it would be difficult to make them understand that they have not been taxed, by telling them that they have paid this sum to be relieved from other taxation. Judge Marshall, said in *Brown* v. *Maryland*: "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the prohibited thing." Is not this our case also? See also *Crandall* v. *Nevada*, 6 Wal. 39.

We are dealing with things, not names, and we respectfully insist that this sum thus paid was, in the strictest sense, a tax. Mr. Justice Miller says, in *Loan Association* v. *Topeka*, 20 Wal. 664, that "taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes." Now, it cannot be denied that $6,245 is a very substantial burden or charge, and it seems equally true that the payment thereof was imposed on the plaintiffs in error to raise money for public purposes; that this stamp tax was, in fact, a distinct and separate source of revenue. All taxes on manufactured tobacco are raised by the sale of stamps, and the act here called in question specially provides that these export stamps shall be, by the Department, "furnished to the several collectors, as in the case of other stamps, and be charged

to them and accounted for in the same manner." The amount received from their sale was paid into the treasury in gross, without abatement for fees or expenses, was embraced in the report of the Internal Revenue Commissioner to the Secretary of the Treasury and Congress as a part of the revenues collected by that department "from this specific source, for stamps for tobacco, &c, intended for export," and was appropriated by Congress and drawn from the treasury as were all the other revenues of the Government. This is all found by the court and admitted by the Treasury Deparment itself, for Mr. Kimball says that "though the value of the stamps sold, over and above the cost of manufacturing and furnishing them, *is in reality an item of revenue*, it was not designed so to be." Can Congress thus collect an item of revenue, and a very large one from 1868 to 1872, from manufactured tobacco exported abroad, and excuse the violation of the constitutional prohibition by saying it did not intend to do so? Surely the court will lookto the effect, and not sacrifice substance to empty form.

In *Pace* v. *Burgess* the court seems to have taken the further view that this payment of twenty-five cents on each package was simply the compensation for services rendered by the officers; but the court below finds, as a fact in this case, "that the fees and charges of the officers who inspected their export tobacco, were paid by the plaintiffs at the rate fixed by the Commissioner of Internal Revenue, under the law, at twelve cents per 100 pounds of tobacco exported, and no part of this money collected from these export stamps could go, under the law, for fees and charges of these officers for *any other expense attending the export of these tobaccos, but all these expenses were paid by the exporter, inclusive of those for cancelling and affixing these export stamps.*" This the Department substantially admits; for in the letter appended to the report of the Committee on Ways and Means it is said: "It may be a question whether the government cannot well afford to furnish these stamps free of expense to exporters, since, in all cases, an inspection fee sufficient to pay for inspecting, marking, branding, &c., is required to be paid by the manufacturer, under regulations prescribed by the Commissioner of Internal Revenue."

Certainly, if the manufacturers paid every other expense to the Government, save only the cost of the stamp, they should have been required to pay only that cost. The fact is, however, that

they were required to pay twenty-five cents for the stamp, which cost the Government, as certified by the court below, not over one-tenth of a cent.

It thus appears that these plaintiffs in error, after paying every other expense incurred by the Government, were compelled, in addition, to pay $6,245.50 for 24,982 stamps affixed to that number of packages of tobacco, which cost not more, perhaps less, than $24.98!

In *Pace* v. *Burgess*, Pace was compelled, under like circumstances, to pay $11,864.50 for stamps on 47,458 packages, which cost, at the same rate, $47.45. So that these two manufacturers alone have been compelled to pay the Government $18,110 for stamps which cost only $72.43!

Can any rule or regulation which works out such a result be either necessary or proper? With these facts before it, can the court still think that this charge is not excessive—that it does not amount to an infringement of the constitutional provision? Congress so admitted when it reduced it from twenty-five to ten cents and then repealed the whole.

Considerable stress seems to be laid by the court upon the point that the twenty-five cents paid for each stamp bore no fixed proportion to the quantity or value of the package to which it was affixed. These, it is said, were unlimited except by the discretion of the exporter or the convenience of handling. In this the court seems to have fallen into error. The law expressly provided that "all *manufactured* tobacco shall be put up and prepared by the manufacturer, for sale or removal, for sale or consumption, *in packages* of the following description, and *in no other manner.*" The packages are then described, and as to the bulk, if not all of the manufactured tobacco exported, it provided that "all Cavendish, plug and twist tobacco (should be put up) in wooden packages not exceeding two hundred pounds net weight." It also declared that "no *manufactured* tobacco shall be sold or offered for sale, unless put up in packages, and stamped as prescribed in this chapter, except at retail by retail dealers, from wooden packages, stamped as provided," &c., under penalty of heavy fine and imprisonment. See sections 3362 and 3363, Revised Statutes.

The limitation contained in section 3362 was construed by the Internal Revenue Department, and properly, we think, to apply to

leaf or unmanufactured tobacco. Two hundred pounds was, therefore, the limit to the package, and the twenty-five cents exacted for the stamp on manufactured tobacco bore substantially a fixed ratio to the amount exported, for, in order to pay as little as possible, the manufacturer put up his packages in small packages, amounting in the aggregate to 200 pounds, or one large one as near that weight as his machinery would permit.

But outside of the law, the size of the packages was limited by other considerations than "the discretion of the exporter or the convenience of handling." It was limited by the requirements of the foreign purchaser; the known usages of foreign trade as to the size of packages, established for half a century; the impossibility of putting up one package of over 200 pounds without changing his machinery at a cost far beyond what the amount saved in stamps would justify; the fact that the putting up of such packages would have been attended with great risk of the loss of the whole bulk of the package; the increased cost of handling, &c. If it had been lawful to put a number of smaller packages into one, of greater weight than 200 pounds, yet put up as manufactured tobacco—subjected to the pressure of many tons—must be, it would have cost more than the manufacturer could have saved. A tax of twenty-five cents on every *package* of flour exported from Richmond to South America is, in fact, as much a tax on every *barrel* as if the law should so provide in terms. No miller would venture the experiment of exporting 1,000 hogsheads or 1,000 square boxes of flour to save such a tax, and the cost of securing a number of barrels so as to stand transportation, and the handling of such unwieldy bulks, &c., would amount to as much as the tax thereby saved.

It is quite certain, without other proof than one's knowledge of the laws ordinarily governing the conduct of men, that these manufacturers put up their tobacco in such a manner as to pay as little as possible for the required stamps, and yet Pace and these plaintiffs in error paid together 18,110 for stamps which cost the Government $72.43, and these latter alone paid $6,245.50 for what cost the Government $24.98. Is not this the imposition of a duty under the pretext of fixing a fee? It is certainly a burden, and a very onerous one, in fact, and we submit should be declared so in law.

But further, the court has in the record a fac simile of the stamp required to be affixed to exported tobacco. If it will refer to the regulations of the Internal Revenue Department, which, by law, the manufacturer was bound to conform to and observe, in order to export his tobacco at all (which will be brought to their attention in oral argument), we respectfully suggest that the wit and ingenuity of man cannot discover one single object which, under any circumstances, that stamp was supposed to subserve, or intended to subserve, which was not completely attained by other requirements of the law and regulations referred to. It was therefore wholly unnecessary.

For these and other reasons, the plaintiffs in error most earnestly pray that the court will reconsider its decision in *Pace* v. *Burgess*, and grant them relief by reversing the judgment complained of.

CHAS. S. STRINGFELLOW,
Counsel for Plaintiffs in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1885.

TURPIN & BRO., PLAINTIFFS IN ERROR,
vs.
RUSH BURGESS, COLLECTOR OF INTERNAL REVENUE for the third district of Virginia. } No. 180.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

TURPIN & BRO., PLAINTIFFS IN ERROR,
vs.
RUSH BURGESS, COLLECTOR OF INTERNAL REVENUE for the third district of Virginia. } No. 180.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

At January rules, 1876, in the circuit court for the city of Richmond and State of Virginia, the plaintiffs brought their suit to recover from the defendant (who was then collector of internal revenue) the sum of $6,245.50, paid by plaintiffs to defendant for certain export stamps affixed to twenty-four thousand nine hundred and eighty-two packages of manufactured tobacco, which had been manufactured by the plaintiffs at their manufactory in the city of Richmond, Va., and which the plaintiffs had declared their intention of exporting.

The suit was removed by certiorari to the circuit court of the United States for the eastern district of Virginia,

and on the 16th day of December, 1881, the plaintiffs filed their amended declaration. On the same day the defendant entered a plea of *non-assumpsit*, upon which issue was joined. The court found the facts as certified in the record at pages 9 and 10, and rendered judgment for defendant; from which judgment this writ of error has been taken. The record does not disclose the error relied upon, but it is presumed to be that the charge for stamps to be affixed to tobacco to be exported is an export-tax, and therefore unconstitutional.

ARGUMENT.

Section 74 of the act of July 20, 1868, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes" (15 Stats., 157) reads as follows:

> *And be it further enacted.* That manufactured tobacco and snuff may be removed in bond from the manufactory, without payment of the tax, to be transported directly to an export bonded warehouse for the storage of manufactured tobacco or snuff established at a port of entry as hereinbefore provided; and the deposit in and withdrawal from any bonded warehouse, the transportation and exportation of manufactured tobacco and snuff, shall be made under such rules and regulations and after making such entries and executing such bonds and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue, which shall in all respects, so far as applicable, conform to the provisions of law and regulations relating to distilled spirits to be deposited in or withdrawn from bonded warehouse or transported or exported. All tobacco

> and snuff intended for export, before being removed from the manufactory shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, 25 cents for each package so stamped shall be paid to the collector on making the entry for such transportation; but the provisions of this section shall not limit the time for tobacco or snuff to remain in bond.

The charge for the stamps named in said section was reduced to 10 cents for each package by section 31 of the act of June 6, 1872 (17 Stats., 254; Rev. Stat., sec. 3385), and was entirely abolished by the act of August 8, 1882 (22 Stats., 372). The several amounts which the suit was brought to recover were paid for stamps required by section 74 of the act of July 20, 1868; that is, "for the expense attending the providing and affixing such stamps."

As to the constitutionality of the act of July 20, 1868, we deem it sufficient to say that it has been expressly affirmed by this court in the case of *Pace* vs. *Burgess, Collector* (92 U. S. Repts., 372). In that case it was held:

1. That the acts of Congress of July 20, 1868, and June 6, 1872, so far as they relate to snuff and tobacco intended for exportation, do not impose a tax or duty on exports within the meaning of that clause of the Constitution which declares that "no tax or duty shall be laid on articles exported from any State."

2. The stamp thereby required was a means devised

for the prevention of fraud, by separating and identifying the tobacco intended for exportation, thus relieving it from the taxatian to which other tobacco was subjected.

3. The proper fees accruing in the due administration of the laws and regulations necessary for the protection of the Government against imposition and fraud likely to be committed under the pretext of exportation, are in no sense a duty on exports; they are simply the compensation given for services properly rendered.

Mr. Justice Bradley, in delivering the opinion of the court, says:

> The plaintiff contends that the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports within the meaning of that clause in the Constitution of the United States which declares that "no tax or duty shall be laid on articles exported from any State." But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of 25 cents or of 10 cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. The large

amount paid for such stamps by the plaintiff only shows that he was carrying on an immense business.

The evidence given to show that the original cost of the stamps was much less than the amount paid for them by the manufacturers is entitled to very slight consideration. The cost of the paper, ink, and printing formed but a small part of the expense of those arrangements which were necessary in order to give to the exporter the benefit of exemption from taxation, and at the same time to secure the necessary precautions against the perpetration of fraud. We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned, and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the Government from imposition and fraud likely to be committed under pretense of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted.

The point to guard against is, the imposition of a duty under the pretext of fixing a fee. In the case under consideration, having due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment

> of the instrumentality which the circumstances of the case render necessary for that protection of the Government.

In this case the circuit court found, among other facts (p. 9 and 10 of printed record), "that the export stamps can be furnished at one-tenth of 1 cent, or less, in quantities," but did not find what was the actual expense attending the providing and affixing the stamps used on plaintiff's tobacco. But if the evidence had shown that, in this particular case, the original cost of the stamps to the Government was much less than the amount paid for them by the plaintiffs, we submit that it would not be entitled to much consideration.

In the language of this court, as above quoted, "the cost of the paper, ink, and printing formed but a small part of the expense of those arrangements which were necessary in order to give to the exporter the benefit of exemption from taxation, and at the same time to secure the necessary precautions against the perpetration of fraud." It will not be denied that Congress has power to tax tobacco manufactured and consumed in the United States. As an incident of this power of taxation, has it not also the power to establish such rules and regulations as may be necessary to prevent frauds by concealing tobacco so as to escape taxation? The policy of such legislation is a matter of legislative discretion, and not of judicial cognizance. In the case of *McCullough* vs. *The State of Maryland*, Chief-Justice Marshall, speaking for the court, said:

> The Government, which has a right to do an act, and has imposed on it the duty of performing that

act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any proper means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

And again:

"The Constitution of the United States has not left the right to Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or any Department thereof.

It is true that the charge for the stamps, fixed by section 74 of the act of July 20, 1868, was reduced to 10 cents for each package by section 31 of the act of June 6, 1872, and entirely abolished by the act of August 8, 1882, but that fact cannot materially affect the question now under consideration. The money for the recovery of which this suit has been brought was paid from 1868 to 1872, inclusive, under the act of July 20, 1868. Congress may have considered certain measures for the prevention of frauds on the revenue to be necessary and proper on July 20, 1868, which were not so considered on the 8th of August, 1882. At any rate, this court has unanimously decided that the act of July 20, 1868, now drawn in question, so far as it relates to tobacco intended for exportation, is not in conflict with that clause of the Constitution which provides "that no tax or duty shall be laid on articles exported from any State."